

INFORMATION

For Lieutenant Collonel Forbes, and John Forbes Writer in Edinburgh Agent for the late Regiment of Sir John Hill at Fort-William,

Against

Captain Allan Cathcart, Captain Menzies and Captain Hamiltoun.

IT is manifest by what is Represented by the Collonel, that the saids Captains have no ground to crave any Money (under the cover of being the Remains of the Retention) either from the Lieutenant-Collonel or Agent, and that both of them ought to be Affoizied from the Complaint by all the Rules that can be called Law or right Reason.

The Collonel *as such* has Right to the Superplus of the Retention, for defraying the contingencies of his Regiment: Especially being in Garison at a Post where he was in some manner both a Civil and Military Governour, and sustained the Charge of both with very notable prudence and Loyalty.

The Collonel Exercised his Right by Ordering this Money to be payed without any other Rule or Restraint than his own Discretion. But his Generosity and Indulgence in giving a part of it at such Occasions as he thought fit to his Officers, would now be distorted by the Complainers; So as to Retaliate his Goodness with his Loss, and the Damage of the Lieutenant-Collonel, whose faithful Services and Expenses for the common Interest, the Collonel did fairly Re-pay or Advance.

Such a Precedent would reach Numbers of other Persons under pretence that they had got Shares of the Retention: By which there would be a Foundation laid for the Captains and their Successors against as many Receivers, and their Representatives, as would make up a new Regiment.

But as the Collonel had not only the Sole Right, but likewise the Sole Administration of the Retention Money, as appears by his being the only Person who drew Orders on, and gave Discharges to the Agent thereanent, (the Captains even when they got benevolences never having given one single Receipt) so the said Collonel Employed the Lieutenant-Collonel on the publick Business, gave him his Instructions, Examined his reports and Expenses, approved his management, allowed his Bills, ordered his re-imbursment, and finally gave Discharges to the Agent thereupon. Whence it is not possible even in Imagination to make such a view of the matter as either the Lieutenant-Collonel or Agent can be reached.

Yet the Gomplainers have been pleased to give in a special Claim to the Right Honourable The Committie of Council, (to whom the Affair was remitted) alledging that the Excellence

crefence of the Retention Money was not Divided as it ought, and was in use to be done there being a great part thereof given to Lieutenant-Collonel *Forbes*, whereof these are the Particulars, *viz.* 1. In the account of Retention from April 1694, to April 1695 (recovered from the Agent) there is stated *per Bills* advanced to the Lieutenant Collonel 410 lib. 13. *ſ.* 3. *d.* Sterling. 2. From April 1695, to April 1696, 227. lib. 10. *ſ.* 5. *ds.* Sterling: After which the Words *as per Receipt* are recently razed. 3. From April 1696, to April 1697, 115. lib. Sterling given to him. 4. From April 1697, to April 1698, by Bills to London 720. lib. Sterling. 5. By two of the Books produced, the Agent Charges himself with the Lieutenant Collonels monthly Pay. And then says, *Item*, 30. lib. 10. *&c.* Which argues a fraudulent concealment, from whence they intend to conclude that the Lieutenant Collonel ought to be Decerned to repeat, or the Agent to make over again a second Payment: But at the same time these Gentlemen forget the Lieutenant Collonels riding Post Four Thousand Miles in the Regiments service and advantages to the value of more as Five Thousand Pounds Sterling obtained to the Regiment by his Means! However.

It is Answered, that the Lieutenant Collonel, and Agent ought to be Afforded by all the *Land marks* of Law and Form, which our Predecessors have set for ensuring the Safety of the Leidges. In so far as

1. All that can possibly be Claimed by the Captains, is comprehended either under their ordinary Pay, or their pretence to a Share in the Retention.

Their pay is fully Discharged both by themselves and the Collonel: And the Collonel has ever since the first Establishment Solly by himself given ample Discharges of the Retention to the Agent: Which proceeded upon allowance of the Articles Debursed to the Lieutenant Collonel, and consequently includes likewise a Discharge to the Lieutenant Collonel, besides his separat instructions which he has thereof.

These Discharges are a *Brasen Wall* against which all Attacks are vain, and are an *Hercules Pillar* beyond which none can go, till the Lords of Session do Reduce them. For by our Law a valid Writ, not labouring of an *Intrinsic nullity* must still while it stands take its effect, (especially when there is no Ryot or Breach of the Peace can be pretended anent it) say and while it be annulled by their Lordships, before whom Dyets not being peremptor, His Majesties Subjects will get time and means of Probation for Defence and Support of their Rights.

It is not doubted, but if the Complainers had Informed their Lawyers of the Tenor of these Discharges, whereby the Affair resolves purely into the Discharging of *privat civil Rights*, they would never have presumed to divert the Lords of His Majesties most Honourable privy Council, from the greater and publick matters of the Nation, either with Complaint or *Compt and Reckoning*. For however Officers in time of War, or while they stand undischarged, may have extraordinary Remeds that they may not be drawn away from their Posts; yet these Gentlemen having returned to their privat Stations, there is no Law for exempting them from *Common Rules*; especially considering what they might have known the Councils mind by their Lordships not allowing the Addreses on the like accompt of the then Lord *Lindsay*, and Collonel *Buchans* Officers to be so much as in the least insisted upon.

2. Suppose (which is a great *postulation*) that the Collonels Right to grant these Discharges were now to be canvassed: His Right to the Remains of the Retention at the least after the Incidents of the Regiment are Discharged, is fully Established by the nature of the thing, by His Majesties Decisions, by the Councils Authority, by the Common usage and custom not only here but every where else; and finally by the *inextricable absurdities* that would follow in a contrary event. Neither are there any Specialities that can distinguish the present case.

The other Officers received all the Pay appointed to them by the Establishment through the hands of the Collonel, who drew Orders and Precepts for the same on the Agent: So that whatsoever is not expressly appointed to the Captains by the Establishment, (as the Retention is not) Remains with the Collonel, and he may retain it, and they have no Title to seek it.

The Common usage, even in this same Regiment, that all Orders for the Agents paying of Money are given by the Collonel, that Accompts are made to him, that Discharges are taken from him; That the Captains Discharges even of their ordinary Pay are presented to him *qua instructions*: And that the Captains do not so much as grant either Discharge or Receipt for Retention; yea, the Gratuities they got of it were payed in Cash without Receipt: Lastly, that the Collonel Dispensed the Remains of Retention, without any Barr to his Inclinations, as to time, manner, or Persons: are more than sufficient Evidences

that what ever he bestowed of the said Money after the Services of the Regiment, was not of pure Benevolence.

If it were otherways, *Collonels* and those of the *Leidges* who deal with them would of men be the most Miserable. For presently *Captains* and their Heirs would not only beat the whole Retentions any time within 40 years from the *Collonels* and their Posterity: But likewise, any Conjunct or confident Person that got Money from them upon Precepts on their Agents must lay down, unless they have kept the Instructions of the onerous cause for what they Received.

Sir *John Hills* *Captains* themselves have *ipso facto* acknowledged, and Homologate his Right accepting unequal Shares from him, and by granting Bonds, which a Man would never do for his own: as appears by the Instances set down in the Condescendence of instructions subjoynd to the *Collonels* Petition: As it is certain that while the Regiment stood, the *Complainers* never dreamed of Challenging their want of former years Shares, which is a best Defence against them when it is Disbanded.

Without further reasoning on this Matter, it is known to the Lords of His Majesties most Honourable privy Council, how His Sacred Majesty has always thus Determined, and how their Lordships did Reject the Petitions of the then Lord *Lindsay*, and *Buchans* Officers before-mentioned:

But the *Complainers* knowing that they want things must invent Names and call their Case a *speciality*. Yet it is most certain that no *Vail* can cover it from Justice.

It is indeed pretended, that tho in the common case the *Collonel* may have the Retention, yet their honest *Collonel* has abandoned his Right by his use and Custom of Communicating with them, which is Instructed *scripto* by two several Writs, viz. 'One in 1694, whereby he says in regard my Officers have been at great Expenses in Recruits after so many Draughts, and other considerable Charges in this Dear and unwholesom place you are hereby Ordered, (viz. the Agent) to pay out the Sum of 1400 lib. sterling which is in your Hands of Retention, according to an Agreement made concerning the same, (At which time two of these Gentlemen were not *Captains*, and had they been, it is presumable, their Proportions of the said Dividend had been but small considering the onerous Cause of the said Gratuity, and the *Complainers* their deserts, which are enumerat in *Collonel Hills* Letters, to my Lord High Chancellor, and my Lord *Tewiot*, but both good Nature, and Manners makes the Lieutenant-*Collonel* forbear Particulars.) And Which Order of Agreement, Major *Forbes* will give you &c. and on the Back thereof Major *Forbes* says, you are to pay the within written Sum, 200 lib. to the *Collonel*, 100 lib. to each *Captain*, except *Stuart* and *Hunter*, whose Shares are to be burdened with 20 lib. to *Captain Cathcart*, and 20 lib. to *Richardson*, &c. The other in 1695, says I desire you to allow Lieutenant *Collonel Hamilton*, 50 lib. sterling over and above the 100 lib. allowed to him at the last Division of the 1400 lib. sterling among the Officers, &c.

But before making particular Answers, the *Complainers* would be pleased to mind, that the *Collonel* in the first part of the foresaid order 1694, says, 'That complaints were made to him, how several persons who had no right to draw upon, or meddle with the Retention Money, do draw upon that Fond upon which he was censured as guilty of neglect in that which was peculiar to his post: therefore he requires the Agent that he answer no Bills, Orders, or make payments of Money upon that Fond, but such as come to you from my self under my own hand: with this assurance, that no other Bills or payments should be allowed in Accompt. After which follows the precise words above set down anent the 1400 lib.

Hence it is Answered.

1. That the alledgance is not instructed, but further, the quite contrary is plainly proven. For the *Collonel* vouches his Right, and that none without his special order shall draw on, or get any Money out of the Retention. They accept of this Paper with this quality, and can never approbat and reprobate the same Write. It bears that even the 1400 lib. was distribute upon a specifick Accompt, viz. Their Expenses about that time in Recruits. The Precept 1695, in favours of *Hamilton*, calls what he got an allowance: and the division of the 1400 lib. likewise an allowance to the Officers. Which plainly implyes that it was only a temporary and precarious grant, quoad these particular Sums: especially considering that it adds this shall be your warrant, without further receipt.

2. It is a method of arguing that is indeed new (which is the only speciality in the case)

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he that deals a part of his excrement rents in *almes*, must give the whole: And a weekly *day* must be continued for ever: *A given Horse* (against the old *Scots Proverb*) must be looked in the teeth. Gratifications which were always esteemed to be *strictly interpreted* must henceforth be stretched beyond the subject gifted, yea beyond all bounds. Liberty must be frightened, by making it of *all* that a man hath, if he let out any indication of his generous mind. There must be no more such a thing as the Lawyers call *res mera facultas* but all now must run to *necessity* and *bonds*: 3. These papers do sufficiently Interpret *themselves* without any such comments as destroy the Text. For the agreement mentioned in the order 1674, is called an order of agreement, and expressly referred to be told by *Major Forbes*, and *Major Forbes* on the back of the same Write tells and signs as is above represented,

There is another piece of new Logick introduced by the Complainers, *viz.* The Accompt of the Retention 1693, is docketed thus, 'I Captain *James Stuart* being ordered by the Collonel to revise the above-written Discharge, do certify that I have examined the Accompt and credentials &c. As also the Collonel in a docket of the Accompt from 1674 to 1698, says, the above written Accompt being viewed by my Officers, and perused by me are found to be just and are allowed by me. Ergo the Retention money belongs to the Officers,

It is Answered, the consequence is denied. And otherwise a comptroller might put up Money in his Pocket, because he is employed by the master of the Money to revise the compt. In a word the Collonel is a good man, a lover not only of a correspondence betwixt Friends, but likewise of his own ease: and therefore it is no marvel, that he took Officers assistance in that, as well as his other undoubtedly peculiar business. But it's a demonstration, that these very things do prove the right to have been owned in the Collonel in so far as, 1. The Officers had orders from him, and he that does by another does himself. 2. The Write bears that they only viewed, but he alone allowed.

3. Suppose (which is still more and more) that the Discharges were to be assaulted, the Collonels right not found to be good: yet neither Lieutenant Collonel nor Agent be liable, because *quoad* the Agent he has made *bona fide* payment by his Constituents order, and as to the Lieutenant Collonel *sum receptit*, he has got but what was due to him by constituent, *viz.* The Collonel, and he neither did nor was obliged to enquire, out what part of his Debtors Estate (whither his own pay or other effects) this Cash did produce.

For clearing wherof, it may be considered, that the common interest of mankind made this a principal in all Nations, *mobilia non habent sequelam*. fluxile Moveables, (especially Money) passes without any burden of the last Possessor, his *personal obligation* in commerce necessary betwixt man and man requires, that there be not Flood-gates open to Pleys for repetition of Money pretended to be wrongfully disposed. This Money not stamped with the word (*Retention*) upon it, and whatever way the Collonel and Agent might have cleared among themselves, in placing Deburments to one Accompt, rather than another: yet the Lieutenant Collonel is no ways concerned out of what Fond his pences were furnished, and it had been Impertinence in him to have asked the Collonel a Question,

As this principal is founded in nature and necessity, so the other that *qui sum receptit* is obliged to refund, is no less plain in Law: as has been lately cleared by the Lords of Session in a famous Decision, upon a remit of Parliament, betwixt *Hope of Ker's* and *Munro of Spot*. But so it is that the Lieutenant Collonel was employed by the Collonel, and proven of him by repeated approbations under his hand herewith produced, which clothed him in all the undertakings which he went about with so much fatigue, and even superfluous Expences out of his own Pocket for the publick good: and consequently he who set him on work was bound to pay his Wages, and such an honest matter did never fail to them.

Its no ways to the purpose, that the Lieutenant Collonel might have done some of his own business in the intervals, but always without prejudice of theirs. For no Sense or Reason can improbate any such industry for a mans self, when no other is indamaged by it: and his imployer and Collonel has been so far from thinking otherwise, that he has fully approved the Lieutenant Collonels faithful discharging of his Trust.

4. As to the particular condescendence, the Lieutenant Collonel and Agent are now concerned to make any Answer thereto; because they most humbly conceive that the three *separat grounds* before represented, are more than sufficient to exoner them without entering to detail.